EBA/Op/2025/03

25 February 2025

Opinion of the European Banking Authority on the European Commission's amendments relating to the final draft Regulatory Technical Standards on the information to be included in the application for authorisation to offer to the public and to seek admission to trading of asset-referenced tokens under Article 18(6) MiCAR

Introduction and legal basis

The European Banking Authority's (EBA) competence to deliver an opinion is based on the fifth subparagraph of Article 10(1) of Regulation (EU) No 1093/2010[1] (EBA Regulation), as the specification of the information to be included in the application for authorisation to offer to the public and to seek admission to trading of asset-reference tokens (ARTs) under Regulation (EU) 2023/1114 on Markets in Crypto-assets[2] ('MiCAR') relates to the EBA's area of competence and is an area where the EBA has been entrusted to develop draft regulatory technical standards.

In accordance with Article 14(7) of the Rules of Procedure of the Board of Supervisors[3], the Board of Supervisors has adopted this opinion which is addressed to the European Commission.

[1] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

[2] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets (OJ L 150, 9.6.2023, p. 40–205).

[3] Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 22 January 2020 (EBA/DC/2020/307).

General comments / proposals

1. On 6 May 2024, the EBA submitted to the European Commission the final EBA draft Regulatory Technical Standards ('RTS') on the information to be included in the application for authorisation to offer to the public and to seek admission to trading of ARTs in accordance with Article 18(6) MiCAR.

2. The draft RTS specified the list of information to be submitted to the competent authority to allow a supervisory scrutiny of the application. In developing the draft RTS, the EBA took into account previous regulatory products on licensing and acted in close cooperation with ESMA, who was also mandated with the development of a similar RTS on the specification of the information to be included in an application for authorisation as a crypto-asset service provider.

3. By letter of 13 January 2025, the European Commission informed the EBA of its intention to endorse with amendments the draft RTS and sent to the EBA a modified version of the standards setting out the envisaged changes ('partial rejection letter').

4. Recital (23) of Regulation (EU) No 1093/2010 (EBA Regulation) specifies that the draft regulatory technical standards 'should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority [the EBA] is the actor in close contact with the market and knowing best the daily functioning of financial markets'. The recital specifies that 'draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation'.

5. The EBA considers substantive the amendments envisaged by the European Commission and listed below in the subsection 'substantive changes'. This notwithstanding, the EBA is of the view that - as explained in the section below - while these amendments are of a substantive nature, they are justified from a strictly legal point of view, to the extent that they follow a narrower reading of the relevant MiCAR provisions which, in some cases, also increase the proportionality of the affected RTS provisions. Consequently, the EBA accepts those proposed amendments, however, the EBA also recommends the European Commission to amend Article 18(5), points (a) and (b) MiCAR at the first available opportunity, to allow a more comprehensive assessment of the suitability of the members of the management body of an issuer of asset-referenced tokens ('ARTs') in order to effectively identify any potential risks in line with the horizontal approach for other financial institutions.

6. Additionally, the EBA considers as 'substantive' the inclusion in recitals (4) and (5), in relation to the maximum retention period for personal data, of the reference to the time necessary to "issue the authorisation to offer asset-referenced tokens to the public and to seek their admission to trading". However, the EBA takes note that the European Commission has agreed, during written exchanges with EBA to delete such reference in the adopted version of the RTS. The EBA considers that this insertion would unduly interfere with the exchange information

system database for fit and proper assessment developed by the EBA together with ESMA and EIOPA in accordance with Article 31a of the ESAs Regulation.

7. This stance is aligned with that expressed by ESMA in its Opinion of 11 October 2024, following the partial rejection by the European Commission of the RTS on the information to be included in an application for authorisation as a crypto-asset service provider (under Article 62(5) MiCAR), where similar substantive changes were proposed by the European Commission.

8. The EBA agrees with the changes summarised in the subsection 'Non-substantive changes' due to their non-substantive nature and given their usefulness in clarifying the text. Among them, the deletion of the definitions in Article 1, and the consequent reduction of the number of Articles from 10 to 9, the exact reference to the provision in MiCAR setting out the information to be specified, and the reversal of the order of paragraphs in some Article for sake of clarity.

Specific comments

Substantive changes

Substantive change 1: Programme of operations

9. In relation to the amendment made in Article 2(2), formerly Article 3(2) of the draft RTS, the European Commission observed that the original wording of the Article laying down the information requirements for the programme of operations of the applicant issuer should not be understood to refer to the white paper described in Article 19 of MiCAR, and as a consequence the RTS should not refer to the white paper or the content of the white paper.

10. The EBA considers this amendment a substantive change. The EBA agrees with the European Commission's view as stated in the partial rejection letter that the content of the programme of operation to be submitted in accordance with Article 18(2), point (d) of MiCAR is separate from the information to be contained in the white paper in accordance with Article 19 MiCAR, and further specified in Annex II.

11. The text of the draft RTS submitted to the European Commission intended to mark this distinction and the autonomy of the white paper from the rest of the documents to be submitted with the application. The draft RTS clarified that, 'without prejudice to all the information contained in the white paper', the application has to include all the information listed in the relevant provision of the RTS relating to the programme of operations. The rationale for such specification was to avoid that the applicant could consider itself as having satisfied of the requirement for the information on the programme of operations simply with the information contained in the white paper

12. The EBA notes that whilst the text amended by the European Commission in Article 2(2) expressly refers to Article 19 MiCAR on the content of the white paper, it agrees that the Commission intention with the proposed amendment broadly aligns with that of the EBA's draft RTS. Therefore, this modification does not affect the policy objective of those provisions.

Substantive change 2. Internal governance arrangements: market abuse and whistleblowing policies

13. In respect of the amendment made in Article 5(1) of the draft RTS submitted to the European Commission (now Article 4(1)), the Commission notes that the information requested on internal governance arrangements for purposes of authorisation should not go beyond what is provided in MiCAR and introduce new substantive elements that are not expressly set out in the MiCAR. For this reason, the request of a policy to prevent market abuse and of a policy for whistleblowers exceeds the mandate and should be deleted.

14. The EBA considers that these modifications are substantive changes. The EBA notes that the mandate for the specification of the information listed in Article 18(2) MiCAR also covers internal governance. Given the potential risk of market abuse and the relevance of preventing such behaviours, an internal policy on market abuse has merits. Nevertheless, the EBA acknowledges that Article 34 of MiCAR on internal governance, does not expressly include the policies on market abuse and on whistleblowing within the required internal policies for issuers of ARTs. Therefore, the EBA could accept this change in the light of the limited express scope of MiCAR and having regard to proportionality reasons. At the same time, the EBA would like to raise the attention to the importance for ART issuers to have an internal policy on market abuse, and considers that this should be reflected in the Regulation at the next available opportunity of review of MiCAR. In the meantime, persons issuing, offering to the public or seeking admission to trading of ARTs may voluntarily put in place such policies as part of effective governance and risk management.

Substantive changes 3: Information on the proprietary DLT where the ARTs will be issued, stored or transferred, that is operated by an applicant issuer or a third-party operator

15. As part of the information to be specified by the EBA for purposes of the mandate set out in Article 18(6) MiCAR, there is also the information to be requested about where ARTs are issued, stored and transferred on the issuer's proprietary Distributed Ledger Technology ('DLT') or similar technology operated by the applicant issuer or by a third-party acting on its behalf (Article 34(5), point (f), cross-referred to by point (l) of Article 18(2) MiCAR).

16. This is a special case where the issuer's proprietary relationship in the DLT, of which it may also be the operator, should be considered from the conflict of interest and stability perspective. In this latter respect, consideration needs to be given to the critical role of DLT for the crypto ecosystem and to the operational risks associated with it. For these reasons, the EBA considered opportune and proportionate requesting the applicant issuer "a technical and security audit performed by an independent third party on the consistency of the DLT functioning with quality standards in the use in the market and on the appropriateness and adequacy of the plans referred to in point (c)".

17. The European Commission notes that requesting a technical and security audit performed by an independent third party on the consistency of the DLT functioning amounts to introducing a new

substantive requirement, which is not expressly foreseen in MiCAR, and proposes to limit the request to the submission of a simple 'technical and security *report*', i.e. not necessarily performed by an independent third party.

18. The EBA acknowledges that a restrictive interpretation of the mandate given to the EBA under MiCAR may lead to this understanding. Therefore, whilst the EBA notes that such requirement had not raised any comments during the public consultation and may be justified by the special role of the applicant issuer in the DLT, the EBA does not recommend changes to the European Commission's proposed amendments.

19. However, from supervisory perspective the EBA takes this opportunity to emphasise that technology, and DLT in particular, is at the core of crypto-asset ecosystem and its well-functioning is of paramount importance, therefore the objective identification of risks, and potential mitigants, by an external auditor review is highly beneficial.

20. For this reason, the EBA would like to reiterate the importance of requesting a technical and security audit performed by an independent third party on the consistency of the DLT functioning, given its relevance to mitigate DLT related risks. The impartiality of the assessment would mitigate potential conflicts of interests, providing increased reassurance to the market and to supervisors. In the light of the above, the EBA would like to invite the European Commission to consider amending Article 18(2), point (l), in combination with Article 34(5), point (f) of MiCAR at the next available opportunity of review of Regulation, in order to include in the list of information to be submitted in the application for authorisation, a third-party audit of the proprietary DLT, where justified in light of the proportionality principle.

Substantive changes 4: Proof of good repute of the members of the management body

22. In relation to the proof of good repute of the members of the management body, the amendment proposed by the European Commission departs from EBA's draft RTS on several aspects.

23. In respect of data minimisation in relation to the personal history of the members of the management body for the assessment of their suitability, the European Commission suggests amending the first sentence of new Article 7(1)(e) (old Article 8) of the draft RTS on authorisations to read as follows: "*member's history, namely all the following:*", instead of "*personal history, including all of the following".* The purpose of the amendment of the first sentence of Article 7(1)(e) of the draft RTS is "to ensure that the types information listed thereunder constitute an exhaustive list."

24. The EBA is of the view that the proposed amendment would resolve issues raised by the European Commission, while ensuring that essential information for evaluating the "good repute" of members of the management body remains intact. The EBA also believes this amendment would enhance clarity and certainty for applicants regarding the specific information required under Article 18(2), point (i) of MiCAR.

25. In addition, the EBA understands that such amendment does not preclude competent authorities in charge of the assessment of the application for authorisation from seeking further clarifications relating to the information provided by applicant issuers in relation to the items exhaustively listed in Article 7(1)(e) of the draft RTS. As such, the suggested amendment would not hinder the thorough assessment of the good repute of the members of the management body of applicant issuers by competent authorities.

26. Additionally, the European Commission considers that (former) Article 8(1)(e)(i) of the draft RTS on the information requested about criminal records for the suitability assessment of the members of the management body should be fully in line with Article 18(5)(a) and (c) of MICAR, which embeds the legislative view of what is relevant for the assessment of the authorisation as issuer of asset referenced tokens. Such provision requires that, for all members of its management body, an applicant issuer has to provide proof of "*the absence of a criminal record in respect of convictions or the absence of penalties imposed under the applicable commercial law, insolvency law and financial services law, or in relation to anti-money laundering and counter-terrorist financing, to fraud or to professional liability*;" [emphasis added].

27. The EBA acknowledges that the amendments suggested by the European Commission match the exhaustive list included in Article 18(5)(a) of MiCAR. The EBA therefore takes note of such amendment and does not intend recommending changes to the Commission's proposed amendments.

28. However, the EBA wishes to emphasise that the assessment of good repute is of paramount importance in assessing the suitability of members of management body in the financial sector and in allowing individuals to undertake such roles in entities active in the crypto asset field. Recent experiences in the crypto-assets environment have clearly confirmed the importance of a rigorous assessment of these requirements by supervisors.

29. In light of the above, it is important to acknowledge that the notion of good repute is a horizontal concept and that it should be aligned to the same standard across the financial sector. Consequently, the EBA recommends to the European Commission to amend Article 18(5)(a) and (c) of MiCAR at the next available opportunity of review of MiCAR. The amend should aim at removing the limitations relating to the scope of the assessment of good repute (in order to include assessment of absence of penalties also in areas other than commercial law, insolvency law, financial services law, anti-money laundering and counter terrorist financing, fraud or professional liability) so that supervisors may confidently carry out a comprehensive assessment of applicants, and of their ability to comply with the relevant requirements of MiCAR.

Non-substantive changes

30. The European Commission has also provided several drafting amendments meant to ease the reading of the draft RTS or to make more explicit the link of some provisions with the legal mandate. The EBA considers that such changes do not imply a change in policy and represent non-substantive changes.

31.The drafting amendments include:

- in Article 1 of the draft RTS, deletion of the definitions set out therein;
- in Article 2 and across the draft RTS a reversal of the order of the paragraphs or points within the lists of requested information;
- in Articles 3 and 5 of the draft RTS, specific reference to the provision of MiCAR which provides the legal basis for the request of the information laid down in that Article of the RTS.
- Some changes have been made in the Recitals to align those with the modified Articles.
- Lastly, the EBA takes note that the European Commission has agreed, during written exchanges with EBA, to remove in recitals (4) and (5), in relation to the maximum retention period for personal data, the reference to the time necessary to "issue the authorisation to offer asset-referenced tokens to the public and to seek their admission to trading" in the adopted version of the RTS. The EBA considers that this addition would adversely impact the ESAs exchange information system database on fit and proper assessment developed under Article 31a of the ESAs Regulation.

Conclusions

For the reasons above, the EBA has endorsed the substantive amendments to the draft technical standards submitted by the EBA, and has accepted the remaining changes on other parts that are not considered substantive. The EBA submits the amended draft RTS to the European Commission in the form set out in the Annex.

This opinion will be published on the EBA's website.

Done at Paris, 25.02.2025

[signed]

[José Manuel Campa]

Chairperson
For the Board of Supervisors